UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

DAVID VOLZ, *et. al.*,	:	
	:	Case No: 1:10-cv-00879
Plaintiffs,	:	(Judge Barrett)
	:	
v.	:	
	:	
THE COCA COLA COMPANY and ENERGY BRANDS, INC.,	:	
	:	
Defendants.	:	

PLAINTIFFS' RESPONSE TO NOTICE OF SUPPLEMENTAL AUTHORITY SUBMITTED BY TRUTH IN ADVERTISING, INC.

Plaintiffs Dave Volz, Ahmed Khaleel, Nicholas Armada, Scott Cook, Stephanie Bridges and Juan Squiabro (collectively, "Plaintiffs"), by and through counsel, submit this response to Truth in Advertising, Inc.'s ("TINA") notice of filing of the Seventh Circuit's decision *Pearson v. NBTY, Inc.*, Nos. 14-1198, 2014 U.S. App. LEXIS 21874 (7th Cir. Nov. 19, 2014) (Dkt. 60). TINA, a special interest group, has no standing in this case and the *Pearson* decision it submitted to the Court is not relevant to the settlement being considered in this case.

The *Pearson* decision involved a Rule 23(b)(3) settlement, and the Court was concerned about the relationship between the fees sought by plaintiffs' counsel and the monetary award to the class, *id*. at *8. This is not an issue in this case which is a Rule 23(b)(2) settlement. With respect to the injunctive relief in *Pearson*, the Seventh Circuit noted that it provided only for "purely cosmetic changes in wording," 2014 U.S. App. LEXIS 21874, at *20, that bound the defendant for a very limited period of time (24 months under the court's calculation), id. at *6. The *Pearson* court also noted that the defendants were to replace the marketing statement "works by providing the nourishment your body needs to build cartilage, lubricate, and strengthen your

joints," with the substantially similar "works by providing the nourishment your body needs to support cartilage, lubricate, and strengthen your joints." *Id*. at *21. The court found this provided no "substantive change." *Id*. And "[e]qually dubious claims found on the original label [were] left unchanged." *Id*.

Here, by contrast, the injunctive provisions require specific additional disclosures (e.g., calories per bottle on front label) and prohibit numerous other statements. *See* Settlement Agreement ¶39(a), (c). In addition, unlike the short-duration of the restrictions in *Pearson*, here the injunctive relief remain in effect for ***ten years*** following the Effective Date, unless the provisions could not be reconciled with changes in the product or the law. Settlement Agreement ¶¶38-39(d). Also, unlike in *Pearson*, here Defendants are not permitted to continue the challenged statements with a "one-word" change. And the injunctive provisions address the purported misstatements alleged in the Second Amended Complaint ("SAC").

The procedural posture of the Vitaminwater case also minimizes any concerns as to a collusive settlement that troubled the *Pearson* court. Whereas the *Pearson* settlement was negotiated eight months after the plaintiffs filed suit, 2014 U.S. App. LEXIS 21874, at *4, the Vitaminwater cases have been actively litigated for several years and the District Court where the MDL was pending has issued a report and recommendation certifying only a (b)(2) class. Similar rulings in the other MDL's class actions would leave injunctive relief of the type proposed in this settlement as the only meaningful remedy available to consumers in these actions. This result is fully consistent with the *Pearson* court's concern that the settlement should promote significant relief.

November 24, 2014

Respectfully submitted,

STRAUSS TROY

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been filed electronically with the U.S. District Court this 24th day of November 2014. Notice of this filing will be sent to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system. If a party is not given notice electronically through the Court's system a copy will be served by ordinary United States mail, first class postage prepaid, this 24th day of November 2014.

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